



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
HIGH COURT CIVIL APPEAL NO.60 OF 2015

SANGANYI TEA FACTORY.....APPELLANT

-VERSUS-

JAMES AYIERA MAGARI.....RESPONDENT

J U D G M E N T

1. This is a civil appeal from the judgment and Decree of J. M. Njoroge, Principal Magistrate in Nyamira, **PMCC NO. 132 of 2010** delivered on 9th October 2013.

2. By the plaint filed on 8th November, the Plaintiff sought the recovery of Kshs.48, 350 plus interest since December 2009 till payment in full. He sued Sanganyi Tea Factory Co. Ltd and Kenya Development Agency Ltd.

The defendant denied that he owed the plaintiff such moneys as claimed.

3. The case proceeded to hearing. By judgment of the court dated 9th October 2013, the court found that the plaintiff has duly proved his case on balance of probability and entered judgment for the plaintiff and the defendants jointly and severally, in terms of prayers (a), (c) and (d)

4. The defendants being dissatisfied have appealed against the said judgment.

5. By their memorandum of appeal dated 6th November 2013, they have set out five (5) grounds of appeal as itemized here below.

1. That the learned trial magistrate erred in law and fact in dismissing the appellant's counterclaim without taking into account the weight of evidence adduced in court.

2. That the learned trial magistrate erred both in law and fact in determining issues in favour of the Respondent without sufficient evidence.

3. That the learned trial magistrate erred in law and fact by applying wrong principle of law in dismissing the appellant's counterclaim.

4. That the learned trial magistrate erred in law and fact by failing to put into consideration the Appellant submissions.

5. That the learned trial magistrate erred in failing to dismiss the plaintiff claim for disclosing No reasonable cause of action.

Their prayer was that the decision be set aside and proper finding be made by this Honourable Court.

6. The appellants filed two records of appeal, first filed on 11th May 2015 – the main record of appeal. The supplementary thereof was filed on 11th June 2015.

The appeal hearing

(a) Submissions by the appellant

This is the genesis of this matter.

(i) The Respondent had sued the Appellants in **Kisii, CMCC No.1282 of 2003**

(ii) That suit was dismissed with costs to the Appellants which costs were assessed at Kshs.48,350/=

(iii) The Respondent, however, did not pay this money to the Appellants.

(iv) The Appellant decided to deduct the moneys from the Respondent's tea produce.

(v) Upon discovery of this deduction, the Respondent filed a suit in **Nyamira, PMCC No.132 of 2010**, his claim was that the deduction were not proper.

(vi) Accordingly the judgment was entered in favour of the Respondent.

(vii) It is the appellant's submissions that the who comes to equity must come with clean hands.

(viii) The Respondent was well aware that he owed some money i.e 48,350/= to the Appellants.

(ix) The Respondent instituted yet another suit without first clearing the money he owed to the Appellants

(x) I submit therefore, that the deduction through tea produce was proper.

(xi) That the appeal be allowed as prayed.

(b) Submissions by the Respondent

Counsel Nyamwange opposes the appeal and states as follows:

(i) The dismissal of the counter claim was proper. The counter claim is an independent case in which the plaintiff becomes a defendant and vice-versa. As such it has to follow all the procedure while prosecuting the plaintiff's pleadings.

(ii) In the instance case the appellants failed to prosecute the counter claim. As no evidence of examination in chief was led in respect of the counter claim and set off. DW1 confined his case on defence alone. His testimony did not touch the counter claim.

(iii) In the circumstances, the first court had no option but to dismiss the counter claim and he rightly did so. A look at the judgment of the court shows that the judgment did not mention the counterclaim anywhere

(iv) The deductions were not right as they did not follow the procedure of the court.

(v) The right procedure to follow was attachment through execution process. Self-help is improper.

This is the first appellate court. And in the first appellate court the court has to read and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusion. The court must, however, bear in mind that it neither saw nor heard the witness and hence make due allowance for it, see **Selle –versus- Associated motor Boat Co. Ltd 1968 E.A. 123.**

Analysis of evidence

This is an appeal dated 6th November, 2013. It sets out five grounds thereof. The gist of which can be summarized in two grounds:

(i) It was an error of law to dismiss the appellant’s counterclaim.

(ii) It was an error of law to find for the respondent without sufficient evidence as the plaintiff’s claim disclosed no reasonable cause of action.

The respondent’s claim sought the recovery of Kshs.48,350 from the 1st Defendant improperly and wrongfully deducted by the appellant. In the evidence, PW1 – reiterated the same and sought the recovery of the sum of Kshs.48,350, produced **PEXH No.2**, being 10 pay slips totaling to the said sum.

In cross-examination the witness did not know his case **No. CMCC NO.1282/2003** had been dismissed with costs against him assessed at Kshs.48, 350/=. He further stated, there was no notification **[to him]** over the issue of costs.

DW1- Isaac Marita- testified for the Defendants. He confirmed that the costs against the respondent were deducted by the defendants from the respondent’s tea payments. He produced a decree as **DEXh. No.1**. To him the costs were lawfully deducted.

However, on cross-examination, he admitted that the deductions were not done according to decree **[of the court]**.

Findings

DW1’s testimony did not touch the counterclaim. Therefore, the defendant simply made a claim of a counterclaim in their pleadings but did not prove the same in their evidence. Unlike in Criminal law, he who asserts a claim must prove it. A counterclaim is a claim which must be proved.

Section 107 (i) States:

“Whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts must prove those facts.”

Section 109 says, further:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law the proof of that fact shall lie on any particular person.”

Section 108 of Evidence Act, also, says:

“The burden of proof in a suit or proceedings lies on that person

Who would fail if no evidence at all were not given on either side.”

See the legal authority of **Susan Mumbi –vs- Kefala Grebedhin (Nairobi HCCC No.332 of 1993)** where **Justice Juma**, as he then was, stated:

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

Therefore because the appellant –Defendant – did not prove the counterclaim, this claim must fail, the lower court was right not take the counterclaim into account.

Secondly, the ground that there was no sufficient evidence in favour of the plaintiff and that the Plaintiff’s case disclosed no reasonable cause of action.

The plaintiff claim was for a liquidated sum of Kshs.48,350, P.W.1’s testimony was not only adequate but also sufficient to prove his claim. **PEXH.2** was produced.

Determination

The appeal dated 6th November 2013 be and is hereby dismissed.

Secondly, the deductions on the respondent’s tea payment was not lawful and proper, it was not executed in accordance with the decree **DEXh. No.1**. It was therefore unlawful and irregular. **Article 159 (2)** of the constitution is, in my view, inapplicable.

Dated at Nyamira this 29th day of April 2016

C.B. NAGILLAH

JUDGE

In the presence of:-

A.R Nyachiro for the appellant

Bwonwong’a hold brief Nyamwange for respondent

Mercy Court clerk